IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL {LODGING} NO.102 OF 2007
IN
WRIT PETITION NO.1392 OF 2006

The Cosmos Co-operative Bank Ltd., Regional Office, 36/A, Maru Niketan, D.L. Vaidya Road, Dadar (West), Mumbai-400 028. .... Appellant

- Versus -

1. M/s. Arth Housing Development Pvt. Ltd., having its registered office at 302, Premier Park, 2nd Dominic Colony, Orlem, Malad (W), Mumbai - 400 064 & Administrative Office at Sneha Sadan, 35-D, Main Avenue, Santacruz (W), Mumbai-400 054.

2. The Divisional Joint Registrar, Co-operative Societies, Mumbai Division, Mumbai. .... Respondents

Shri A.Y. Sakhare i/b M/s. YKS Legal for the Appellant.

Sarvasri M.P.S. Rao with Yogendra Kanchan i/b Premchand Pal & Ms Nanda Kamble for the Respondent No.1.

CORAM: R.M.S. KHANDEPARKAR &
Dr. D.Y. CHANDRACHUD, JJ.

DATED: FEBRUARY 26, 2007

ORAL JUDGMENT (Per R.M.S.Khandeparkar, J.):

Taken on board on request.

2. Heard. Admit. The learned Advocate for the

respondents waives service. By consent, taken up for final hearing.

3. This appeal arises from the order dated 12-7-2006 passed by the learned single Judge in Writ Petition No.1392 of 2006. By the impugned order, the learned single Judge has rejected the petition filed against the order dated 27-6-2005 passed by the Divisional Joint Registrar, Co-operative Societies, Mumbai Division, Mumbai. By the said order dated 27-6-2005 the Divisional Joint Registrar has set aside the order dated 9-9-2002, passed by the Special Recovery Officer under Section 156 of the Maharashtra Co-operative Societies Act, 1960, hereinafter called as "the said Act".

4. The controversy relates to alleged failure on the part of the respondent (No.1) to comply with their liability to pay the dues regarding the auctioned property. It is the case of the respondent that they were not informed about the encumbrance about the liability of more than rupees twelve lakhs to the housing society when the property was put to auction, while it is the case of the appellant-Bank that the proclamation sufficiently disclosed the outstanding dues being the liability of the purchaser at the auction.

5. The learned senior counsel appearing for the

appellant, drawing attention to the proclamation, submitted that the Clauses (1) and (2) r/w the remaining portion of the said notice clearly reveal that the property was put to auction on "as is where is and as is what is basis", further bringing to the notice of the intending purchaser that the property taxes and all other outgoings which were outstanding in respect of the said property would be payable by the purchaser. The learned counsel appearing for the respondent, on the other hand, submitted that the provisions of law in terms of the Rule 107 of the Maharashtra Co-operative Societies Rules, 1961, hereinafter called as "the said Rules" and in particular sub-rule 11(e)(ii) clearly require the concerned authorities to disclose the encumbrance to which the property is subjected to in the proclamation in relation to the sale of the property and in the case in hand, it was never disclosed in the proclamation notice that the property is subject to liability of rupees twelve lakhs and odd to the housing society. Being so, according to the learned counsel appearing for the respondent, no fault can be found with the order of the Divisional Joint Registrar as well as of the learned single Judge setting aside the order of the Recovery Officer whereby the EMD was sought to be forfeited on account of the alleged failure on the part of the respondent to pay the balance amount.

6. The provisions of law comprised under Rule 107 of the said Rules clearly require the proclamation to disclose all the encumbrance on the property to be sold. The Rule 107(11)(e)(ii) clearly reveals that "The proclamation shall state the time and place of sale and specify as fairly and accurately as possible". When the law clearly states that the proclamation should disclose "as fairly and accurately as possible" with reference to any encumbrance to which the property is subjected to, it evidently requires that the concerned authority should specify the exact amount of the charge or encumbrance on or over the property which is put to auction. In the absence of such disclosure, the purchaser cannot have any idea about the subsisting charge or encumbrance on the property put to auction. In fact, the provisions of law comprised under Rule 107(11)(e)(ii) are clearly meant to put the purchaser on guard about the encumbrance on the property and therefore it is necessary that the purchaser should get a clear idea about the subsisting liability which he has to incur on purchase of the property. Being so, no fault can be found with the order passed by the Divisional Joint Registrar holding that the Rule 107 of the said Rules clearly requires the proclamation to specifically disclose the encumbrance with necessary details. Undisputedly, in the case in hand, the details regarding the liability towards the housing society to

the extent of rupees twelve lakhs and odd were not disclosed in the terms and conditions of the tender notice or the proclamation. Mere statement to the effect that "the property is subject to all property taxes and all the other outgoings which are outstanding in respect of the said property" do not amount to disclosure of the necessary encumbrance as clearly and accurately as is required under the said statutory provision. Hence there is no case made out for interference in the impugned order. However, the learned Advocates are justified in contending that it is necessary to clarify that in such cases there is no question of forfeiture of the amount. The entire sale being contrary to the provisions of the mandatory requirement of Rule 107(11)(e)(ii), question of forfeiture of the EMD does not arise and the purchaser could be entitled for refund of such amount. With these observations, the appeal is dismissed. No order as to costs.

(Dr.D.Y.Chandrachud, J.) (R.M.S.Khandeparkar, J.)

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